A **PENGARAH KASTAM NEGERI JOHOR & ANOR**

v.

KEDAI MAKAN KEBUN TEH (SUTERA UTAMA) SDN BHD & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
C [CIVIL APPEALS NO: J-01-457-10-2012
& J-01-458-10-2012]
4 APRIL 2014

D ***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Delay of three days - Whether applied for extension of time - Whether delay explained - Whether requirement of time mandatory in nature - Whether application could be entertained - Rules of the High Court 1980, O. 53*

E ***REVENUE LAW:*** *Sales tax - Assessment - Notice on liability to pay sales tax and penalty - Application for leave to challenge notice by way of judicial review by taxpayers - Whether application limited by time - Delay of three days - Whether applied for extension of time - Whether delay explained - Whether application could be entertained - Rules of the High Court 1980, O. 53*

F ***REVENUE LAW:*** *Sales tax - Assessment - Notice on liability to pay sales tax and penalty - Application for leave to challenge notice by way of judicial review by taxpayers - Whether taxpayer statutorily obliged to exhaust internal remedy first - Whether taxpayers exhausted remedy under s. 68 Sales Tax Act 1972 - Whether taxpayers could employ remedy*
G *under s. 141N Customs Act 1967 before exhausting remedy under Sales Tax Act 1972*

The appeals herein were filed by the appellants against the decision of the learned High Court Judge who had granted leave
H to the respondents (taxpayers) to mount a challenge against the decision of the Director of Customs Johor ('first appellant') on a sales tax matter by way of a judicial review application. The grievance on the part of the respondents was caused by the notice ('the impugned notice') which stated that the taxpayers
I were liable to pay sales tax for the years 2010 and 2011 and the

attendant penalty imposed by the first appellant. The appeals were founded on two issues, *inter alia*, that (i) the application for leave ('encl. 1') was filed out of time; and (ii) the respondent had not exhausted the internal remedy that was available to redress its grievance caused by the decision of the appellants. It was contended by the respondents that s. 141N of the Customs Act 1967 ('Customs Act') enabled it to go to court and file the prerogative writ to quash the impugned notice.

Held (allowing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The application was made under O. 53 of the Rules of the High Court 1980 ('RHC') whereby the stipulated time frame for an aggrieved party to file his application was set at 40 days from the date on which the impugned decision was first communicated to him or from the date when the grounds for the application first arose. The requirements that needed to be complied with by the applicant were mandatory in nature and must be adhered to strictly by an applicant desirous of obtaining leave for judicial review. In this case, the respondents had filed the application outside of or beyond the stipulated time-frame of 40 days whereby it was filed three days late and had therefore breached the mandatory requirement under O. 53 of the RHC. (paras 7, 8 & 12)

(2) The law is clear that delay *per se* may be innocuous but its occurrence, whatever its period, must be explained by the party in whose interest it is to have it excused by making the necessary application to the court. On the facts, there was no application made by the respondents to the court to extend the time to regularise the breach. Neither was there any explanation offered by the respondents as to why there had been a delay and a non-compliance of the express provision on time. Hence, the trial court was not properly clothed with the threshold jurisdiction to entertain the application in the first place. Hence, encl. 1 is an abuse of the process of the court and ought to be dismissed. (paras 13 & 15)

(3) Based on the authorities, it was clear that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running to the courts for what is essentially a discretionary relief. (para 19)

(4) The recourse as provided under s. 141N of the Customs Act could only be had after the respondents had exhausted the available remedy as provided for by the Parliament within the four corners of the Sales Tax Act 1972 ('STA'). Section 141N cannot be employed to bypass what has been provided under s. 68 of the STA. Thus, the respondents must have exhausted its appeal remedy with the Director General of Customs in respect of the impugned notice as envisaged under s. 68 of the STA. (paras 17, 18 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan di sini difailkan oleh perayu-perayu terhadap keputusan Yang Arif Hakim Mahkamah Tinggi yang telah memberikan kebenaran kepada responden-responden (pembayar cukai) untuk mencabar keputusan Pengarah Kastam Negeri Johor ('perayu pertama') berkenaan dengan perkara cukai jualan melalui permohonan semakan kehakiman. Ketidakpuasan hati responden-responden adalah disebabkan oleh notis ('notis yang dipersoalkan') yang menyatakan bahawa pembayar-pembayar cukai tersebut bertanggungan untuk membayar cukai jualan bagi tahun-tahun 2010 dan 2011 dan denda berkaitannya yang dikenakan oleh perayu pertama. Rayuan-rayuan ini adalah berasaskan kepada dua isu, antara lain, bahawa: (i) permohonan untuk kebenaran ('lampiran 1') difailkan di luar masa; dan (ii) responden tidak menggunakan kesemua remedi dalaman yang sedia ada untuk menebus ketidakpuasan hati yang disebabkan oleh keputusan perayu-perayu. Dihujahkan oleh responden-responden bahawa s. 141N Akta Kastam 1967 ('Akta Kastam') membolehkannya memohon daripada mahkamah dan memfailkan writ prerogatif untuk membatalkan notis yang dipersoalkan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Permohonan dibuat di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di mana tempoh masa yang dinyatakan bagi pihak yang terkilan memfailkan permohonannya ditetapkan sebagai 40 hari dari tarikh apabila keputusan yang dipersoalkan tersebut pertama kali dimaklumkan kepadanya atau dari tarikh apabila alasan untuk permohonan tersebut mula-mula berbangkit. Keperluan-keperluan yang memerlukan pematuhan oleh pemohon adalah bersifat mandatori dan mesti dipatuhi secara ketat oleh pemohon yang ingin mendapatkan kebenaran untuk semakan kehakiman. Dalam kes ini, responden-responden telah memfailkan permohonan di luar atau melampaui tempoh masa 40 hari yang ditetapkan di mana ia difailkan lewat tiga hari dan dengan itu, melanggar keperluan mandatori di bawah A. 53 KMT.

(2) Undang-undang adalah jelas bahawa kelewatan semata-mata adalah tidak berbahaya tetapi apabila berlakunya perkara itu, walau apa pun tempoh masanya, perlu dijelaskan oleh pihak yang mempunyai kepentingan terhadap pengecualiannya dengan membuat permohonan yang perlu kepada mahkamah. Berdasarkan fakta, tidak ada permohonan yang dibuat oleh responden-responden kepada mahkamah. Juga, tidak ada apa-apa penjelasan yang ditawarkan oleh responden-responden mengapa terjadinya kelewatan dan ketidakpatuhan peruntukan jelas untuk masa. Maka, mahkamah perbicaraan tidak mempunyai bidang kuasa 'threshold' untuk mempertimbangkan permohonan ini. Dengan itu, lampiran 1 adalah penyalahgunaan proses mahkamah dan wajar ditolak.

(3) Berdasarkan otoriti-otoriti, adalah jelas bahawa apabila statut memperuntukkan remedi dalaman lanjut bagi pihak yang terkilan, maka, adalah wajib cara tersebut digunakan dahulu sebagai mekanisma bagi ketidakpuasan hati tersebut. Dalam perkataan lain, responden wajib dari segi statut untuk menggunakan remedi itu dahulu sebelum memohon kepada mahkamah apa yang pada asasnya adalah relif budi bicara.

(4) Jalan penyelesaian seperti yang diperuntukkan di bawah s. 141N Akta Kastam hanya boleh digunakan selepas responden-responden menggunakan remedi yang diperuntukkan oleh Parlimen dalam Akta Cukai Jualan 1972 ('ACJ'). Seksyen 141N tidak boleh digunakan untuk memintas apa yang telah diperuntukkan di bawah s. 68 ACJ. Oleh itu, responden-responden sepatutnya telahpun menggunakan remedi rayuannya dengan Ketua Pengarah Kastam berkaitan dengan notis yang dipersoalkan tersebut seperti yang dibayangkan di bawah s. 68 ACJ.

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Ong Guan Teck & Ors v. Hijjas Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***

Re Preston [1985] 1 AC 835 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Tengku Anoomshah Tengku Zainal Abidin & Anor v. Collector Land Revenue, North-East District, Penang & Anor [1995] 3 CLJ 434 HC ***(refd)***

Legislation referred to:

Customs Act 1967, s. 141N

Rule of the High Court 1980, O. 53 r. 3(6)

Sales Tax Act 1972, s. 68

For the appellants - Lee Chee Thim; SFC

For the respondents - Lau Kok Guan (Noor Liana Hashim with him); M/s Lau Kok Guan Liana & Assoc

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

[1] These are appeals filed by the Attorney-General's Chambers on behalf of the appellants, against the decision of the learned trial judge sitting in Johor Bahru High Court who had granted leave to the respondents (taxpayers) to mount a challenge against the decision of the first appellant on a sales tax matter by way of judicial review application. If that challenge were to prove successful at the substantive hearing, the impugned decision will invariably be quashed by the High Court issuing a *certiorari* to that effect.

[2] The grievance on the part of the respondents (taxpayers) was caused by the notice dated 9 April 2012 which had stated that the taxpayers were liable to pay sales tax for the years 2010 and 2011 (combined) and the attendant penalty imposed by the first appellant Pengarah Kastam Negeri Johor. The disputed amount was RM700,140.30. The appeal for case number J-01-458-10/2012 was heard together before us with case number J-01-457-10/2012 and it was agreed by parties that the decision in the former case would bind the latter case, *mutatis mutandis*.

[3] At the outset, this appeal was concerned not on the merits or otherwise of the amount that was being claimed by the appellants and that was being disputed by the respondents (taxpayers). Rather, this appeal had arisen due to the objections that were raised by the Attorney-General during the leave application hearing and which objections had been overruled by the learned trial judge who had allowed leave to be granted to the respondent taxpayer to proceed with its judicial review of the impugned decision contained in the said notice dated 9 April 2012.

[4] This appeal was founded on two issues. First, it was submitted by the learned Senior Federal Counsel ('the SFC') that the application for leave (lampiran 1) was filed out of time. Secondly, it was contended by the SFC too, that the respondent taxpayer had not exhausted the internal remedy that was available to redress its grievance caused by the decision of the appellants.

[5] We had occasion to hear the able submissions by both parties during the course of the appeal hearing and we had also occasion to read the materials placed before us for our due consideration.

[6] Having done so, we were of the view that this appeal ought to be allowed and we had indeed so ordered. We now proffer our reasons for having done so.

[7] On the first ground of appeal, namely the fact that the respondent taxpayer was out of time when it had filed this application, we are in agreement with the learned SFC that the requirements that needed to be complied with by the applicant were mandatory in nature and must be adhered to strictly by an applicant desirous of obtaining leave for judicial review.

[8] It must be noted that this application was made under the old Rules of the High Court 1980 whereby the stipulated time-frame for an aggrieved party to file his application under O. 53 was set at 40 days from the date on which the impugned decision was first communicated to him or from the date when the grounds for the application first arose (see O. 53 r. 3(6) RHC 1980).

[9] The law in this regard is trite. Granted that the threshold upon which leave may be granted is not necessarily high, nevertheless adherence to its stated requirements as contained in O. 53 have been strictly enforced by the courts. We are aware that the threshold requirement for leave to issue had been reiterated in the case of *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490 in that in order to be successful, the application must not be one that is frivolous or vexatious and that it justifies further argument on the substantive motion.

[10] On the matter of strict observance of the requirements of O. 53, with respect, we need only to refer to the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145. That case had stated

clearly the rationale for the strict compliance of the express requirements of O. 53. The apex court in that case, through the judgment of the learned Justice James Foong FCJ had this to say:

> The stringent conditions imposed by O. 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. In the instant case, the appellant was clearly handicapped, *inter alia*, through limitation of time, in applying for judicial review under O. 53 r. 3(6) of the RHC. Order 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief against a public authority concerning an infringed right protected under public law. When such an explicit procedure is created, then as a general rule all applications for such relief must adhere to the procedure prescribed under O. 53 of the RHC, failing which the applications would be liable to be struck off for abuse of the process of court.

[11] The courts have been consistent in pursuing this approach as could be seen in the decision of the Court of Appeal in the case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123. In fact, in *Seruan Gemilang (supra)*, it was stated by Justice Zaleha Zahari JCA (as she then was) that "compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction." Thus the need for rigid adherence to the express dictates of O. 53 of the RHC 1980.

[12] We noted too that, on the facts before us, the notice in this case though dated 9 April 2012, was only first communicated to the respondent taxpayer on 12 April 2012. Being aggrieved by the said notice, the respondent taxpayer then filed in the Johor Bahru High Court its application (lampiran 1) under O. 53 of the RHC 1980 on 25 April 2012. The learned SFC had taken issue on account of the fact that it was filed outside of or beyond the stipulated time-frame of 40 days. It was in fact filed three days late and had therefore breached the mandatory requirement under O. 53 of the RHC 1980.

[13] It could be argued that the delay was merely three days as opposed to a situation where the delay was for a longer period. Again it was noted that there was no application to the aforesaid court made by the respondent taxpayer to extend time to

regularise the breach. Neither was there any explanation offered by the respondent taxpayer as to why there had been a delay and a non-compliance of the express provision on time. The law in such a situation is clear. Delay *per se*, may be innocuous but its occurrence, whatever its period, must be explained away by the party in whose interest it is to have it excused by making the necessary application to the court. Learned SFC had referred to us to the case of *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704 where it was held at para. 66 that jurisdiction may only be exercised upon obligatory compliance with the imperative requirement of time set out under O. 53 r. 3 of the RHC 1980. In that case, similarly, the appellants had not applied for an extension of time nor did they offer any explanation for the delay. The learned Justice Abdull Hamid Embong JCA (as he then was) speaking for the Court of Appeal dismissed the appeal by the applicants who had failed to apply for an extension of time to file the application for leave. To our mind, the learned Justice Vincent Ng described the legal proposition aptly when he had ruled, in the case of *Tengku Anoomshah Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor* [1995] 3 CLJ 434 as follows:

> However, the words "or, Except where the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made" in Order 53 r. 1A, which deals with the applications, would sufficiently clothe the court with power to extend time to enable the aggrieved party to apply for leave to issue an order of *certiorari*. But though the court has an unfettered discretion to grant or refuse an extension of time, the rules of court must *prima facie* be obeyed; and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant.

[14] The rationale for such a ruling was proffered in the case of *Ong Guan Teck & Ors v. Hijjas Kasturi* [1982] CLJ 31; [1982] CLJ (Rep) 616; [1982] 1 MLJ 105 in that if such was not the case, then the party in breach of the rules would have the unfettered right to extension of time which then would defeat the very purpose and object of the rules on limitation of period.

[15] On the facts of this case before us, clearly the respondent taxpayer had failed to comply with the time stipulation as contained in O. 53 of the RHC 1980 and we agree that there was merit in the objections as raised by learned SFC in that regard. As there was no application before the learned trial judge in Johor Bahru for an extension of time to abridge time that had lapsed, we respectfully would agree with learned SFC that the learned trial judge in Johor Bahru was therefore not properly clothed with the threshold jurisdiction to entertain this application in the first place. Lampiran 1 is therefore an abuse of the process of court and ought therefore to be dismissed. On that ground alone, this appeal ought to succeed.

[16] Be that as it may, we are of the respectful view that the respondent taxpayer also ought not be granted leave in the circumstances of this case because it had not exhausted its statutory remedy as provided for under s. 68 of the Sales Tax Act 1972 to the Director-General of Customs, which provides as follows:

> 68. Disputes and appeals. (1) Where any person disputes the decision of a proper officer acting in the course of duty under section 3 he may appeal therefrom to the Director General, whose decision on such dispute shall, subject to subsection (2), be final.

[17] It was contended by the respondent taxpayer that s. 141N of the Customs Act 1967 enabled it to go to court and file the prerogative writ to quash the impugned notice. That section provides as follows:

> (1) Where an appeal is lodged with the Tribunal and the appeal is within the jurisdiction of the Tribunal, the issues in dispute in such appeal, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless.
>
> (a) the proceedings before the court were commenced before the appeal was lodged with the Tribunal; or
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> (b) the appeal before the Tribunal is withdrawn, abandoned or struck out.

A (2) Where paragraph (1)(a) applies, the issues in dispute in the appeal to which those proceedings relate, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the appeal before the court is withdrawn, abandoned or struck out.

B

[18] Having perused that provision, we would agree with learned SFC that such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament within the four corners of the Sales Tax Act 1972. C That would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy with the Director-General of Customs in respect of the impugned notice as envisaged under s. 68 of the Sales Tax Act 1972 *(supra)*. While s. 141N seems to suggest that the aggrieved party may go to the High Court, it D does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director-General.

[19] Again, with regard to the statutory remedy as contained E under s. 68 of the Sales Tax Act 1972 *(supra)* we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 2 MLJ 41, *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ F 451; [1987] CLJ (Rep) 110; 2 MLJ 185, and *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505. These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that G grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief. The apex court in the *Robin Tan* case *(supra)* was guided by what Lord Templeman had said in the *Re Preston* case [1985] 1 AC 835 to H the following effect:

> Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

I

[20] The respondent taxpayer had invited the Court to do just the opposite of what was stated by Lord Templeman and with respect, such invitation ought not to be accepted by the Court. As such, we see no merit in the argument by the respondent taxpayer pertaining to s. 141N of the Customs Act 1967. It cannot be employed to bypass what has been provided under s. 68 of the Sales Tax Act 1972. There is no escaping compliance with the statutory appeal process to the Director General of Customs by the aggrieved party as provided thereunder.

[21] Premised on the above, we had allowed the appeal before us. In the upshot, the orders made by the learned judge in the Johor Bahru High Court in allowing leave to be granted to both the respondent taxpayers in both cases were accordingly set aside. We awarded costs to the appellants in the sum of RM3,000 in each appeal.